The Defense Line

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Ex Parte Communications with Former Employees Under the Maryland Rules of Professional Conduct

by Larry R. Seegull and Jill S. Distler

The ethical considerations regarding *ex parte* communications with former employees have generated significant litigation and commentary nationwide. In Maryland, the application of the Rules of Professional Conduct to such communications has proven difficult, and the line between ethical and unethical conduct has certainly been blurred. Historically, Rule 4.2 of the Maryland Rules of Professional Conduct has governed a lawyer's contact with parties represented by counsel, but has not specifically addressed communications with former employees. In the absence of guidance in the Rule itself and of Maryland precedent addressing the issue, several judges of the United States District Court for the District of Maryland have considered the scope and application of the Rule to such communications and have reached contradictory results. Lawyers desiring to contact former employees of an opposing party on an *ex parte* basis, and those trying to prevent such contacts, have therefore often been unsure of what conduct constitutes a violation of the Rules.

The Court of Appeals of Maryland amended Rules 4.2 and 4.4 of the Rules of Professional Conduct, effective January 1, 2002. The amendments, when considered in conjunction with the official Comments, provide some clarification on the issue of *ex parte* communications with former employees. A discussion of former Rule 4.2 will assist in understanding the ethical concerns lawyers have faced regarding this issue and in determining the extent of clarification that the amended Rules provide.

I. Former Rule 4.2 of the Maryland Rules of Professional Conduct

Neither the plain language of former Rule 4.2, nor the official Comment to the Rule, discussed whether the Rule applied to *ex parte* contact with former employees. Former Rule 4.2 of the Maryland Rules of Professional Conduct provided only that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The Comment stated that the Rule "prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

A. Initial Cases Interpreting Former Rule 4.2 Focus on Extent of Former Employee's Exposure to Confidential Information

In the initial District of Maryland cases that addressed *ex parte* communications with former employees, the court found that lawyers violated Rule 4.2 when they contacted former employees who had been extensively exposed to the opposing party's confidential information. In *Camden v. State of Maryland*, 910 F. Supp. 1115 (D. Md. 1996), an employment discrimination case, counsel for the plaintiff contacted the former Special Assistant to the President of defendant Bowie State University. As part of his duties, the former Special Assistant had consulted with top University administrative officials and University attorneys regarding the case and had been actively involved in sending and receiving confidential

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President's Message

Harold MacLaughlin — Tydings & Rosenberg

For the 2002 – 2003 year, we have expanded our Executive Board and added new members.

John Parker Sweeney and Tony Taddeo, Jr. from Miles & Stockbridge are heading up Judicial Selections. While Tony has been on the Board in prior years, John is a newcomer to this position.

In Appellate Practice, we are most fortunate to have Andy Janquitto and Linda Woolf. Andy's book, *Maryland Motor Vehicle Insurance*, is one of the few I keep on my desk as an everyday resource. Linda is with Goodell, Devries, Leech & Dann, LLP and has participated in the past regarding Judicial Selections. The Defense Line will once again be put out by Jim O'Neill and Gerry Tostanoski from Tydings & Rosenberg, LLP. Natalie Stroud Fenner (Franklin & Prokopik, P.C.) and John Griffith are on Membership and have been joined by George F. Ritchie who, like John, is with Piper and Mulberry. Steve Leder and Julie Maloney are in charge of our Programs. We have added a Section called "Educational Forum", which is co-chaired by two Past Presidents' Ford Loker from Church Loker, Radcliffe & Silver, P.A. and Jack Harvey from Wharton Levin Ehrmantraut Klein & Nash, P.A. They will prepare educational programs for professional and community groups.

Two more newcomers are Gary B. Eidelman from Saul Ewing, LLP and Jay Fries. With Maryland's changing employment environment, the overlap with tort and workers' compensation issues is often problematic. We welcome their degree of expertise. Negligence and Insurance has Geoffrey Genth from Kramon & Graham, P.A. and the return of Kevin H. Murphy from Carr Goodson, P.C.. Products Liability is co-chaired by Cappy Potthast and newcomer, James A. Frederick, from Goodell, Devries, Leech & Dann, LLP. Susan Boyce is a new addition to Professional Malpractice. Susan and Kathy Bustraan from Lord & Whip will co-chair this group while Joe Jagielski and Bob Erlandson from Lord & Whip repeat as co-chairs of the Workers' Compensation Section. Our DRI State Representative is Chip Hill from Venable, Baetjer and Howard, LLP and Laura Cellucci from Church Loker & Silver, P.A. is our DRI Young Lawyer's Representative.

The present make-up of your Board and its recent expansion is in part our response to the major political changes that have occurred in Annapolis - the Senate, the House and the Office of Governor.

In the Senate Judicial Proceedings Committee, longtime Chairman, Senator Walter M. Baker (D. - Upper Eastern Shore), has been replaced by Senator Bryan E. Frosh (D. - Montgomery County). Three other members of JPC either retired or lost their reelection bids. We are likely to see Bills that make it out of Committee when in the past they disappeared in Senator Baker's desk.

On the House side, some of the dominant political leaders of past sessions have left. Most significantly was the defeat of House Speaker Casper, R. Taylor, Jr. (D. - Western Maryland). The new Speaker, Delegate Michael E. Bush, will preside over a body that consists of 47 freshman Delegates who constitutes one third of the membership. In the House Judiciary Committee, nine out of the twenty-two members who were there last session are gone. Of those remaining, only five are returning lawyers.

Most importantly Dan Moylan from Venable, Baetjer and Howard, LLP heads up our Legislative Section and both Dan and our other Committee Chairs could use your help. Do you know anyone on our Board? Please call them – volunteer, become involved – PARTICIPATE. Thanks.

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communications. The defendant's attorneys moved to disqualify the plaintiff's counsel based on their *ex parte* communications with the former Special Assistant.

In considering the motion to disqualify plaintiff's counsel, Judge Messitte declined to follow Maryland State Bar Ethics Committee Opinions that permitted contact with former employees. Instead, Judge Messitte adopted the approach suggested by Preliminary Draft No. 10 of the Restatement (Third) of the Law Governing Lawyers, which included in its no-contact rule "a person whom the lawyer knows to have been extensively exposed to relevant trade secrets, confidential client information, or similar confidential information of another party interested in the matter." Explaining that this no-contact rule focuses on the extent of the confidences shared rather than the individual's status as an employee, Judge Messitte stated that prophylactic measures must be taken to protect the confidences and that such protection can be accomplished if organizational counsel is present to object or if the court has set appropriate ground rules in advance. Judge Messitte concluded that "[o]nly insofar as a former employee has been *extensively* exposed to confidential information and only insofar as an adversary attorney knows (or, it must be added, should reasonably know) of that fact, will *ex parte* contact be precluded." (Emphasis in original.) If, however, a former employee's exposure to confidential information is less than extensive, and so long as privileged matters are respected, counsel is permitted to engage in *ex parte* communications with former employees. Concluding that plaintiff's counsel violated Rule 4.2 by communicating *ex parte* with the former Special Assistant who had extensive exposure to confidential information, the court suppressed all testimony by the former Special Assistant and disqualified plaintiff's counsel from the proceedings.

The court again considered *ex parte* communications with former employees in *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997), *aff'd on different grounds*, 141 F.3d 1162 (4th Cir. April 30, 1998), and *Ag Gro Services Company v. Sophia Land Company, Inc.*, 8 F. Supp. 2d 495 (D. Md. 1997). In *Zachair*, plaintiff's counsel agreed to dismiss the defendants' former general counsel as a named defendant in the lawsuit in exchange for his promise to discuss the case informally with plaintiff's counsel. Judge Davis adopted the *Camden* rationale and found that plaintiff's counsel's seven-hour interview with the defendants' former general counsel violated Rule 4.2. The plaintiff's counsel was well aware of the interviewee's former position as defendants' general counsel and knew, or should have known, that he had been extensively exposed to confidential information concerning the defendants. Judge Davis stated that the concern shared by Rule 4.2 and the attorney-client privilege is that an individual or entity that reveals confidences to an individual occupying a position of high responsibility "should enjoy some assurance (at least in the context of on-going litigation) that those confidences cannot be freely divulged to third parties unless certain prophylactic measures are in place." The court found that defendants were deprived of any opportunity to invoke prophylactic measures to prevent their former general counsel from disclosing confidential information directly relevant and material to the case and, accordingly, disqualified plaintiff's counsel from further representation.

The court in *Ag Gro* disqualified counsel who interviewed the opposing party's former counsel and persisted with the interview even after the formal counsel began disclosing confidential and privileged matters. Judge Garbis stated, however, that "[t]his Court does not find there to be an absolute prohibition against an attorney's speaking with an adverse party's former attorney or former employee who has had access to privileged information[, but that] this Court finds that doing so entails a risk of participation in the breach of an adversary's reasonable expectation of privilege protection for confidential communications."

B. Judge Smalkin Disagrees With Colleagues' Interpretation

Contrary to the approach taken in *Camden*, *Zachair*, and *Ag Gro,* in which the court looked at the extent of the former employee's exposure to confidential information, the court in *Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. 956 (D. Md. 1997) insisted on a strict interpretation of the language of Rule 4.2. Judge Smalkin disagreed with the proposition that the Rule should be interpreted by the court differently from the interpretation given to it by the Maryland State Bar Association, which had indicated in ethics opinions that contact with former employees of an opposing party is permitted. In Judge Smalkin's view, the Court of Appeals of Maryland would not reach beyond the plain language of the Rule to incorporate, as did Judge Messitte, suggestions in a preliminary draft of the Restatement of the Law Governing Lawyers. Judge Smalkin stated that the incorporation of such suggestions should "be made by a duly promulgated amendment to the rule itself, rather than by the gloss of caselaw."

C. Recent Cases Fail to Reconcile Conflicting Decisions

Despite the conflicting decisions from several of the judges of the United States District Court for the District of Maryland, subsequent opinions have failed to relieve the conflict and provide Maryland lawyers with a clear explanation of what constitutes unethical conduct. In *The Plan Committee in the Driggs Reorganization Case v. Driggs*, 217 B.R. 67 (D. Md. 1998), a case involving disclosures by the same former general counsel at issue in *Zachair*, Chief Judge Motz recog-

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nized "that the area of contacts with former employees is a veritable minefield in which, until it is cleared by authoritative interpretation of Rule 4.2 by the Maryland Court of Appeals (or at least collegial consideration of the issues by the Fourth Circuit or the District Court), short and tentative steps are the most appropriate." Chief Judge Motz, while observing that it would have been prudent to first seek permission before engaging in the *ex parte* conduct at issue in the case, concluded that he need not reconcile or choose between the contradictory positions taken by his colleagues because he could distinguish the instant case from *Camden* and *Zachair* and therefore deny defendants' motion to dismiss, suppress evidence, and disqualify counsel.

According to Chief Judge Motz, the instant case was distinguishable from *Camden* because it involved communications with defendants' former general counsel. Chief Judge Motz explained that this fact actually weighed in favor of, rather than against, denying defendants' motions to dismiss, suppress, and disqualify for the following three reasons: (1) the purpose of Rule 4.2 in protecting lay witnesses unfamiliar with their rights and duties under the law was not a concern; (2) a former attorney who discloses confidences is subject to disciplinary sanction, which provides a strong deterrent against unauthorized disclosures protected by Rule 4.2; and (3) Rule 4.2 permits contact with a former employee if the contact is "authorized by law," and the former general counsel's disclosures concerned the defendants' alleged underlying fraudulent conduct and therefore may have been authorized by Rule 1.6(b) of the Rules of Professional Conduct, which "permits a lawyer to rectify the consequences of a client's criminal or fraudulent act in furtherance of which the lawyer's services were used." Chief Judge Motz distinguished in the instant case from *Zachair*, which involved contacts with and disclosures by the same former general counsel at issue in the instant case, based on the following: (1) the disclosures at issue in the instant case, unlike in *Zachair*, related to the defendants' alleged underlying fraudulent conduct; (2) in the instant case, the former general counsel is the one who initiated the communication with plaintiff's counsel and volunteered to provide information regarding the alleged fraudulent conduct; and (3) the plaintiff's counsel sought to corroborate the information provided. Chief Judge Motz concluded that even if plaintiff's counsel had violated Rule 4.2 by talking to the defendants' former general counsel, the appropriate remedy would be disciplinary action against the former general counsel and perhaps against plaintiff's counsel, but not dismissal of the adversary proceedings, suppression of evidence, or disqualification of counsel.

In *Sharpe v. Leonard Stulman Enterprises Limited Partnership*, 12 F. Supp. 2d 502 (D. Md. 1998), plaintiff's counsel communicated with three former rental agents of a landlord accused of discrimination. In considering the defendant's motion to preclude the use of the affidavits and potential testimony of the former agents, Judge Legg stated that he did not need to resolve the conflict between his colleagues' opinions because all of the opinions "agree that the Rule does not prohibit *ex parte* communication with former employees who do not possess confidential or privileged information, and whose statements or actions cannot be imputed to their former employer." Judge Legg first determined that the language of Rule 4.2 and its Comment did not, on its face, prohibit the *ex parte* contact. Judge Legg found that the agents did not play a role in the alleged "steering" of the plaintiffs and that the employees were not in a position that would permit their actions or statements to be imputed to the defendant. Thus, the approach accepted by the court in *Davidson*, *i.e.*, a strict application of the language of Rule 4.2, did not result in a finding that plaintiff's counsel violated Rule 4.2. Judge Legg further found that an application of the *Camden* and *Zachair* opinions, which considered factors beyond the strict language of Rule 4.2, likewise did not result in a finding that plaintiff's counsel violated the Rule. The holdings of *Camden* and *Zachair*, according to Judge Legg, are limited to protecting confidential or privileged communications and therefore do not apply to the plaintiff's former rental agents, who had not been exposed to confidential or privileged information.

Judge Davis recently reaffirmed his interpretation of Rule 4.2 without discussing his colleagues' conflicting views. In *Collier v. RAM Partners, Inc.*, 159 F. Supp. 2d 889 (D. Md. 2001), Judge Davis applied his opinion in *Zachair* when considering the defendant's objection to plaintiff's counsel's failure to obtain the defendant's consent, or the consent of defendant's counsel, prior to speaking to a former manager for the defendant. Judge Davis explained that "[*e*]*x parte* contact with former employees of a party is prohibited only under circumstances in which the former employee has been "*extensively exposed*" to confidential information and there exists a risk that confidential information protected by the former employer's attorney-client privilege might be disclosed without an opportunity for the former employer to claim the protection of the privilege." Judge Davis therefore maintained his views regarding the application of Rule 4.2 to *ex parte* communications with former employees despite the conflicting decisions issued by his colleagues.

Given the conflicting decisions within the District of Maryland and the failure of subsequent opinions to relieve the tension among the court's various opinions, attorneys desiring to communicate with former employees on an *ex parte* basis have been placed in a difficult position. In a recent opinion, a United States Magistrate Judge for the District of Maryland stated that the court is also placed in a difficult position when asked to construe state ethics rules. In *Rogosin v. Mayor and City Council of Baltimore*, 164 F. Supp. 2d 684

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(D. Md. 2001), Magistrate Judge Bredar refused the plaintiff's attorney's request for permission to interview defendant's former employees because the task of construing state ethics rules should be left to state courts and because the court was reluctant to issue an advisory opinion on the applicability of Rule 4.2. It therefore appears that attorneys concerned about violating Rule 4.2 may be faced with difficulty obtaining prior court approval and are left to proceed at their own peril.

II. Recent Amendments to the Maryland Rules of Professional Conduct

The Court of Appeals of Maryland amended Rules 4.2 and 4.4 of the Maryland Rules of Professional Conduct effective January 1, 2002. Amended Rule 4.2(a) provides: "[I]n representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so." The amended Rule substituted the word "person" in place of the word "party" in former Rule 4.2.

Contrary to former Rule 4.2, the amended Rule does not end with the above provision. Rather, it specifically addresses the prohibition on *ex parte* contacts when the represented person is an organization: "If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability." (Emphasis added.) The Rule continues: "The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization." (Emphasis added.) The strict language of the amended Rule concerns only communications with current employees. Amended Rule 4.2 does not mention former employees and therefore does not, on its face, prohibit communications with former employees.

The Comment to amended Rule 4.2 likewise does not apply to former employees. In fact, the Commentary instructs the reader to see Rule 4.4(b) regarding communications with former employees. Rule 4.4(b) is a new section added to Rule 4.4 and provides: "In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure." The Comment to Rule 4.4 states: "Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. A lawyer may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege." (Emphasis added.)

Rule 4.4(b), when read in conjunction with its Comment, suggests that lawyers are not prohibited from communicating with a third person, including a former employee of a corporation. Rule 4.4(b) imposes limits on the information an attorney may seek "[i]n communicating with third persons," but does not, by its strict language, prohibit the communication in the first place. Rather, Rule 4.4(b) appears to address the concerns enunciated in *Camden* and *Zachair* concerning protecting confidential and privileged information of an organization, but does not prohibit all communications with a former employee who is privy to such information. Rule 4.4(b) is therefore more aligned with the decision in *Ag Gro*, in which Judge Garbis refused to find "an absolute prohibition against an attorney's speaking with an adverse party's former attorney or former employee who has had access to privileged information."

Despite the implication in Rules 4.2(a) and 4.4(b) and their respective Comments that communicating with former employees, even those privy to privileged and confidential information, is not in itself prohibited, attorneys must still tread carefully regarding confidentiality and privilege issues. Rule 4.4(b) prohibits an attorney from knowingly seeking confidential and privileged information, and speaking with an adverse party's former employees who have access to confidential or privileged information entails a risk that such information may be disclosed. Moreover, given that the amended Rules have only been in effect for a short period of time, it remains to be seen how the conflicting decisions in the District of Maryland will be resolved in light of the amendments and how the State and Federal courts will apply the amendments to *ex parte* communications with former employees. ■

Recent Decisions

SUBSTITUTED SERVICE NOT A PREREQUISITE TO COURT-ORDERED "NAIL AND MAIL" UNDER RULE 3-121(c).

In Pickett v. Sears Roebuck & Co., 365 Md. 67 (2001), the Court of Appeals examined the provisions of Maryland Rule 3-121(c), which permits the district court to order any "appropriate" means of service that is reasonably calculated to give actual notice, when good faith efforts to serve a defendant by certified mail have failed. The question presented was whether the district court erred by ordering substituted service by "nail and mail," when there was evidence that the defendant had evaded service, but the plaintiff had not complied with the provisions of subsection (b) relating to a defendant evading service. The Court of Appeals held that attempting service by subsection (b) was not a prerequisite for court-ordered service by "nail and mail" pursuant to subsection (c).

In Sears, the plaintiff filed a debt collection action against the defendant in the district court as a result of an alleged unpaid credit card balance. The district court issued a summons, which plaintiff sent to the defendant by certified mail, return receipt requested. The summons was returned unclaimed and "non-est" return was docketed with the court. A process server tried unsuccessfully to serve the defendant with a second summons on five occasions.

Plaintiff filed a Motion for Service of Process Pursuant to Rule 3-121(c) and an affidavit of due diligence from the process server. The district court granted the motion and ordered that service be made by posting a copy of the summons and complaint at the defendant's residence and by first-class mail to the defendant's residence from the Clerk of the Court. Thereafter, plaintiff filed a Motion to Quash Service of Process, which the district court denied.

After judgment was entered for the plaintiff and the Circuit Court affirmed, the Court of Appeals granted certiorari. The court observed that the private process server's affidavit, and the fact that service by certified mail was returned unclaimed, established that "the usual and customary methods of service would not suffice." The court held, therefore, that the district court "struck a constitutionally sufficient balance" and that its "order for substituted service . . . by first-class mail and posting at [the defendant's] residence was reasonably calculated . . . to apprise [the defendant] of the action brought against him . . . ." Id. at 85 (citing Golden Sands Club Condominium, Inc. v. Waller, 313 Md. 484 (1988)). In so holding, the court distinguished Miserandino v. Resort Properties, Inc., 345 Md. 43 (1997), where the Court of Appeals held that service by "nail and mail" was insufficient as the *primary* method of service. Id. at 83-84.

COURT OF APPEALS CLARIFIES WHAT TYPE OF EMPLOYEES MAY FILE CLAIMS UNDER STATE WAGE PAYMENT AND COLLECTION LAW

In *Baltimore Harbor Charters, Ltd., v. Ayd*, 365 Md. 366 (2001), the Court of Appeals reversed a Circuit Court's dismissal of an executive's claim under the Maryland Wage Payment and Collection Act, Md. Code, Lab. & Emp. § 3-501 *et seq.* (1991, 1999 Repl. Vol.), and remanded the case to the Circuit Court for a new trial on the Wage Payment and Collection Act claim.

Baltimore Harbor Charters, Ltd. ("BHC") operated a charter cruise business in the Baltimore and Annapolis areas. Frank Ayd served as President and Treasurer of BHC from 1994 until 1996. At the outset of Ayd's term as Vice President and Treasurer, Ayd and BHC agreed that Ayd would receive a $200 "captain's fee" per charter and would also receive a $200 per month administrative fee. Ayd also claimed that in 1994 BHC had agreed to pay him a $576.92 weekly salary for management, consulting, and other services, as well as for performing his services as President and Treasurer of BHC. However, because of cash flow problems at BHC's, Ayd often did not receive his weekly salary. After Ayd left BHC in 1996, he filed suit in Circuit Court alleging, *inter alia*, a violation of the Wage and Payment Collection Act ("Wage Act"). The Circuit Court held that because Ayd had not been paid in regular pay periods, he was not protected by the Wage Act, and therefore, dismissed the Wage Act Claim.

The Court of Appeals reversed, and identified six factors that should be addressed when determining whether an individual meets the definition of "employee" under the Wage Act: (1) the employer's control over the performance of the individual's work; (2) the course of business of the enterprise for which such service is performed; (3) whether the individual is customarily engaged in an independently established trade, occupation, profession, or business; (4) the supplier of the instrumentalities, tools, and location for the work to be performed; (5) the source of wages for work performed on the employer's behalf; and (6) any ownership interest in the business permitting the individual to affect the general policies and procedures of the business. The Court held that an employee does not lose the protections of the Wage Act solely because an employer fails to set regular pay periods, or fails to pay wages during set pay periods, and remanded the case to the Circuit Court, therefore, for a new trial on the Wage Act claim.

REAL ESTATE BROKERS NOT LIABLE UNDER LEAD PAINT AND CONSUMER PROTECTION ACTS

In *Dyer v. Criegler*, 2002 Md. App. LEXIS 1, 788 A.2d 227 (2002), the Court of Special Appeals held that real estate brokers and agents who list and promote a residential real estate property are not "owners" within the meaning of the Lead Paint Act (Md. Code Ann. Env. §§ 6-801- 6-852) and the mean-

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ing of the Consumer Protection Act (Md. Code Ann. Com. Law §§ 13-101 to 13-501). The appellate court upheld the lower court's grant of a motion to dismiss for failure to state a claim in this negligence case.

A child's mother, Sheree Dyer, alleged that her child was exposed to lead paint in a leased home, for which Otis Warren Real Estate Services was the rental agent. Dyer argued that the Lead Paint Act imposed a statutory duty of care upon the agent, in that the definition of "owner," to whom the Lead Paint Act applied, includes leasing agents. Dyer also argued that the leasing agent was liable under the Consumer Protection Act.

Relying on premises liability principles and agency law, the court held that the inclusion of leasing agents in the statutory definition of owner applies only to leasing agents who "hold or control" the property, and not those who only list, promote or effect a sale or rental of property. The court based its holding both on the statutory definition of owner, which includes a provision that the owner must hold or control the property, and on the entire statutory scheme of the Lead Paint Act. The Court also denied liability under the Consumer Protection Act, because real estate agents are explicitly exempt from its provisions.

IMPROPER STORAGE OF HANDGUN DEFEATS PRODUCTS LIABILTY CLAIM AGAINST MANUFACTURER FOR SELF-INFLICTED SHOOTING DEATH OF BOY

In *Halliday v. Sturm*, 138 Md. App. 136 (2001), the Court of Special Appeals held that a gun manufacturer was not strictly liable for the self-inflicted shooting death of the appellant's three-year-old son because the handgun owner's improper storage and failure to heed warnings constituted an unforeseeable misuse of the handgun. The court upheld the gun manufacturer's motion for summary judgment and found that the handgun did not malfunction and was not defective.

The appellant alleged that the handgun failed to include a safety device and the warnings and instructions provided to the father by the retailer when he purchased the gun were inadequate to prevent the fatal accident. Her son found the handgun under his parents' mattress and obtained a loaded magazine from a nearby bookshelf. Citing *Hood v. Ryobi America Corporation*, 181 F.3d 608 (4th Cir. 1999), the court observed that "Maryland law imposes no duty to predict that a consumer will violate clear, easily understandable safety warnings" and found that the warnings to plaintiff were "clear, unmistakable, and easy-to-follow."

Relying on the definition of the "normal" function of a handgun from *Kelley v. R.G. Industries*, 304 d. 124 (1985) ("to propel bullets with deadly force"), the Court found no malfunction in this case. The Court determined that the handgun functioned as intended, and that the risk-utility test was inapplicable.

CREDIT LIMITED TO BENEFITS PAID OR PAYABLE BY THE EMPLOYER OR INSURER

In Chesapeake Haven Land Corp., et al. v. Litzenberg, 141 Md. App. 411 (2001), the Court of Special Appeals affirmed a judgment limiting the worker's compensation carrier's credit against an employee's future compensation benefits to the percentage of the employee's third-party recovery attributable to benefits paid or payable by the employer or insurer.

Litzenberg was injured when he was driving a vehicle owned by his employer, Chesapeake Haven Land Corporation. The employer's compensation insurer provided medical and vocational rehabilitation and temporary total disability benefits. Litzenberg was eventually able to obtain other employment with a salary equal to his salary with Chesapeake. In addition to filing a worker's compensation claim, Litzenberg filed suit against David A. Bramble, Inc., and Cramaro Tarpaulin Systems, Inc., and obtained a jury verdict of $398,549.82. Of this amount, $213,000 was for future loss of earnings, not for loss of future from a second job.

Pursuant to §§ 9-902 and 9-903 of the Labor and Employment Article of the Maryland Code, a workers' compensation insurer has a right of subrogation against a third-party recovery obtained by a claimant. In this case, the insurer sought a credit against future compensation payments totaling the net amount of the jury verdict, including the full amount of future loss of earnings. After taking into account satisfaction of the compensation insurer's current lien, and certain additional fees, expenses and costs, the carrier requested a credit of $212,687.30. The Workers' Compensation Commission, without any apparent rationale, calculated the insurer's credit against future compensation payments to be $60,285.22.

On appeal, Chesapeake, citing §9-902 of the Labor and Employment Article and related case law, argued that the Workers' Compensation Commission had no authority to reduce its credit against Litzenberg's future compensation payments. The Court of Special Appeals held that where an employee's self-employment earnings are excluded from the calculation of workers' compensation benefits, the workers' compensation insurer does not have a right to a credit against future compensation payments with respect to that unrelated portion of the overall recovery. In this case, the future economic loss award represented 60% of the overall recovery. Therefore, the insurer's credit was properly reduced by 60%.

CORPORATE OFFICERS AND DIRECTORS NOT VICARIOUSLY LIABLE UNDER LEAD PAINT ACT

In *Shipley v. Perlberg*, 140 Md. App. 257 (2001), the Court of Special Appeals affirmed summary judgment for the defendant and held that a corporate officer or director could not be held individually liable for the tortious acts of a corporation, absent evidence that the officer or director took part in the commission of the tort or evidence that the officer or director specifically directed the particular act to be done.

In *Shipley*, the plaintiff and her family rented and lived in

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a property owned by one corporation and managed by another. The plaintiff lived in the property for over two years as a young child. During that time, the city served the corporation managing the property with a lead poisoning violation, and the plaintiff was diagnosed as having elevated blood levels and lead poisoning. The defendant was a corporate officer of the corporation that owned the property occupied by the plaintiff and her family.

At trial and on appeal, the plaintiff argued that it was unnecessary for the defendant to have knowledge or control over the tortious actions that resulted in her lead poisoning, or in the alternative, that the defendant's deposition testimony in another case showed that he had knowledge and participated in managing his properties in general. In addition, the plaintiff argued that the defendant was personally liable under the Baltimore City Housing Code and partnership law.

The court held that the defendant needed to have participated in the tortious activity and that the defendant's prior deposition testimony in the other case was irrelevant. The court also held that the Baltimore City Housing Code provides for corporate liability only, and that there was insufficient evidence of a partnership between the defendant and the corporation.

CLAIMANTS ENTITLED TO REIMBURSEMENT FOR TRANSPORTATION TO AND FROM HEALTH CARE PROVIDER

In *Breitenbach v. N.B. Handy*, 366 Md. 467 (2001), the Court of Appeals held that a workers' compensation claimant "receiving medical treatment pursuant to an award of the Maryland Workers' Compensation Commission (the "Commission") is entitled to reimbursement for the cost of transportation to and from the treating health care provider."

William Breitenbach, an employee of N.B. Handy Company, filed a workers' compensation claim that was uncontested by N.B. Handy and its insurerer, American Mutual Insurance Company. After the Commission passed an order granting Breitenbach benefits, including medical treatment, he requested reimbursement for the miles he traveled to and from the treatment. After the request was denied, Breitenbech received a hearing before the Commission, which ordered the employer and insurer to reimburse Breitenbach. On appeal, the Circuit Court for St. Mary's County granted summary judgment in the employer and insurer's favor, holding that Breitenbach was not entitled to reimbursement. Breitenbach appealed to the Court of Special Appeals. Before the case reached the Court of Special Appeals, the Court of Appeals took the case on certiorari on its own motion, and reversed the circuit court's grant of summary judgment.

At issue was the statutory construction of the Act, and, in particular, whether the employee's reasonable travel expenses were covered by § 9-660(a) of the Act, which relates to medical services and treatment provided on order of the Commission. Rejecting the employer and insurer's argument that travel expenses were not reimbursable because their award is not clearly specified in the Act, the court held that reasonable transportation costs are covered. The court reasoned that because "§ 9-660 is not clear and unambiguous on the question of the employer and insurer's obligation to reimburse an employee receiving medical treatment . . . . [for travel costs], given the remedial nature of the Act and" of § 9-660 in particular," the rule of liberal construction resolved the issue in the employee's favor.

Underlying the decision was the principle that the Act is remedial in nature and "should be construed liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes." The court also stated that the Commission's statutory interpretation, which favored the employee, was "entitled to some deference."

PRIOR LICENSE AND REGIONAL ADVERTISEMENT HELD INSUFFICIENT FOR PERSONAL JURISDICTION

In *Jafarzadeh v. Feisee*, 139 Md.App. 333 (2001), the Court of Special Appeals held that a Virginia doctor's contacts with Maryland were insufficient to confer personal jurisdiction over the doctor for purposes of a patient's medical malpractice action, despite the fact that the doctor was listed in the Persian-American Yellow Pages serving the Washington Metropolitan region.

Jafarzadeh brought a medical malpractice claim against Feisee in the Circuit Court for Prince George's County. Jafarzadeh alleged that she was injured as a result of Dr. Feisee's negligence that occurred in Dr. Feisee's Virginia office. The Circuit Court granted Dr. Feisee's motion to dismiss for lack of personal jurisdiction. Jafarzadah appealed, contending that Dr. Feisee's contacts with Maryland were sufficient to establish personal jurisdiction under the long-arm statute.

Jafarzadah argued that Dr. Feisee purposefully availed herself of the privilege of conducting business in Maryland because she: 1) had been licensed in Maryland since 1972; 2) was licensed by the State as a Medicaid provider from 1992 – 1998, resulting in $462.29 in Medicaid payments; and, 3) had advertised in the Persian-American Yellow Pages, which served the District of Columbia, Virginia, Maryland, and Pennsylvania. The Court of Special Appeals disagreed, holding that such contacts were insufficient to establish personal jurisdiction.

In so holding, the Court distinguished Presbyterian University Hospital v. Wilson, 337 Md. 541 (1995), in which a Pennsylvania hospital had provided services to Maryland residents, including plaintiff, and was the only hospital registered as a Maryland Medicaid provider and designated as a liver transplant referral center. Moreover, the hospital had "other contacts" in Maryland that directly resulted in the claimant seeking a transplant there. By contrast, Jafarzadah had been referred to Dr. Feisee by an acquaintance and not through any of Dr. Feisee's contacts with the State.

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Noting that because the cause of action did not arise out of, nor bear any relation to Dr. Feisee's contacts with Maryland, the Court stated that for i*n personam* jurisdiction to attach, continuous and systematic general business conduct was required. The Court determined that no such conduct was established with respect to Dr. Feisee. First, there was no evidence that Dr. Feisee "purposefully engaged in conduct that resulted in the Medicaid payments or her listing in the yellow pages." Second, Dr. Feisee did not "regularly do or solicit business, engage in any persistent course of conduct, or derive substantial revenue from goods, foods, services, or manufactured products used or consumed in the State." The Court held, therefore, that Dr. Feisee did not purposefully avail herself of the privilege of conducting business in Maryland. As such, the requirements of Maryland's long-arm statute and due process were not met. ■

Discovery Abuse Can Lead to Dismissal of Claims Against a Discovering But Non-Moving Party

Matthew T. Wagman — Miles & Stockbridge P.C.

In *Hossainkhail v. Gebrehiwot*, No. 1135, 2002 Md. App. LEXIS 65 (Md. App. April 4, 2002), the Court of Special Appeals (J. J. Eyler) held that the Circuit Court did not abuse its discretion in denying Appellant's Motion for Reconsideration after Appellant repeatedly refused to comply with discovery requests leading to a dismissal of his case. The Court held further that a discovering but non-moving party could be dismissed from a case in which an opposing party refuses to answer properly served discovery requests.

Appellant Hossainkhail filed a personal injury action in April 1999 against the Appellees, the Gebrehiwot's and Nina Kirby, as a result of a three car accident that occurred in 1996. In June and August 2000, the Gebrehiwot's and Kirby, respectively, propounded Interrogatories and Requests for Production of Documents to Appellant. Appellant never responded to these discovery requests. Finally, after four months and multiple requests for responses, the Gebrehiwot's filed a motion to compel. Appellant's Counsel responded to the Motion by stating that he had been unable to contact the Appellant. The circuit court granted the Motion in October 2000 and ordered Appellant to serve responses within thirty days of the date of the order.

In November 2000, Kirby notified Appellant that her discovery requests also remained unanswered. After the thirty-day period for compliance with the Circuit Court's Order had elapsed, the Gebrehiwot's filed a motion to dismiss Appellant's case for failure to provide discovery and for violating the discovery Order. In response, Appellant's counsel again stated that he could not locate his client. In January 2001, because Appellant had still not responded, the Circuit Court dismissed Appellant's claim as to all parties, with prejudice. Soon thereafter, Appellant responded to the discovery requests and filed a motion for reconsideration, which the Circuit Court denied.

The Court of Special Appeals upheld the Circuit Court's denial of the motion for reconsideration, finding that the Circuit Court did not abuse its discretion in light of the nature of the discovery violations, the timing of the disclosure, and the reason (or lack thereof) for delay. The Court stated that failures to provide discovery are substantial violations of the Maryland Rules and that the Appellant had a duty to move his case forward. Moreover, the Court found that the Appellant's delay – without any justifiable cause – created an inherent prejudice to the trial process because, among other things, the passage of time increases the likelihood that witnesses cannot be located or remember specific details relevant to their testimony.

The Court also reviewed whether the Circuit Court had the power to dismiss Appellant's claim *vis-à-vis* Kirby because Kirby, although a discovering party, did not move to dismiss. In upholding the Circuit Court's decision, the Court held that when one party is a discovering party and a moving party under Rules 2-432(b) and 2-433(b) (motion to compel before motion for sanctions), and the other party(s) are discovering but not moving parties, a trial court may sanction an offending party (upon written motion) after a motion to compel is granted and then violated. In this instance, the Court held that, in extreme cases, a trial court has the authority to impose sanctions against the offending party with respect to its claims against the discovering but not moving parties, based on the conduct of the offending party, the need for effective relief to the discovering and moving party, and the failure to obey an order of court. Accordingly, the Court held that the Circuit Court acted within its discretion to dismiss Hossainkhail's claim against Kirby (the discovering, but non-moving party), based on Hossainkhail's conduct, and to protect the court's process. ■

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Tydings & Rosenberg
100 East Pratt Street, 26th Floor
Baltimore, Maryland 21202

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EDITOR: James J. O'Neill, III

Submit articles, announcements, spotlights, and comments to:
James J. O'Neill, III
TYDINGS & ROSENBERG
100 East Pratt Street, 26th Floor
Baltimore, Maryland 21202
410-752-9700
